SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 374

JOHN F. DICE,

Petitioner,

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITIONER'S BRIEF

RICE A. HERSHEY,
FREDERIC O. HATCH,
Counsel for Petitioner.

GOTTWALD, HERSHEY & HATCH,
Of Counsel.

INDEX

Subject Index

Citations

STATUTES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 374

JOHN F. DICE,

Petitioner,

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Supreme Court of Ohio is reported in 155 O.S. 185, 98 N.E. 2d 301. The opinions of the Court of Appeals of Summit County, Ohio, an intermediate appellate court, and the Common Pleas Court of Summit County, Ohio, the trial court, are unreported and appear in the appendix, *infra*, Court of Appeals opinion, p. 23, and Common Pleas opinion, p. 29.

Jurisdiction

The final order and judgment of the Supreme Court of Ohio was entered on March 28th, 1951, 155 O.S. 185 at 186. The petition for a writ of certiorari was filed June 4th, 1951 and was granted October 8th, 1951. The jurisdiction of this courts rests upon Section 929 (3) of the Judiciary Act of June 25, 1948 (28 U.S.C.A. 1257(3)).

The final judgment of the Supreme Court of Ohio involves questions of substance arising under the Federal Employers' Liability Act. This judgment is not in accord with the decisions of this court in *Garrett* v. *Moore-McCormick*, 317 U. S. 239, 63 Supreme Court 246; *Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 625; and *Chicago, Milwaukee & St. Paul R.R. Co.* v. *Coogan*, 271 U. S. 472 (1926).

It is also in conflict with decisions rendered by the United States Courts of Appeals for the Second, Sixth, Eighth and Ninth Circuits upon similar questions in the following cases—

Ricketts v. *Pennsylvania Rd. Co.*, 153 Fed. (2d) 757 (Second Circuit, 1946);

Thompson v. *Camp*, 163 Fed. (2d) 396 (Sixth Circuit 1947);

Brown v. *Pennsylvania Rd. Co.*, 158 Fed. (2d) 795 (Second Circuit, 1947);

Irish v. *Central Vermont Ry.*, 164 Fed. (2d) 837 (Second Circuit, 1947);

Graham v. *Atchison, T. & S. F. Ry. Co.*, 176 Fed. (2d) 819 (Ninth Circuit, 1949);

Chicago & N.W. Ry. Co. v. *Curl*, 178 Fed. (2d) 497 (Eighth Circuit, 1950).

It is in further conflict with recent decisions rendered by appellate courts in the following States: the Supreme Court of Utah in *Kirchgestner* v. *Denver & R.G. W. R. Co.* (Utah 1950), 218 P. (2d) 685; and the Courts of Appeals of Cali-

fornia in *Pacific Ry. Co.* v. *Dewey* (1949), 95 Cal. App. (2d) 69, 212 P. (2d) 255 and *Union Pacific Rd. Co.* v. *Zimmer* (1948), 87 Cal. App. (2d) 524, 197 P. (2d) 863.

This conflict creates a lack of uniformity in the administration of rights, duties and obligations arising under the Federal Employers' Liability Act.

Questions Presented

Nine specifications of error are set forth in petitioner's petition for a writ of certiorari. Each of these specifications derives from each of the nine separate paragraphs of the syllabus of the decision of the Supreme Court of Ohio.

The Supreme Court of Ohio erred—

1. In holding that a complete release is not void because of fraud in the factum, where it was executed by a person of ordinary mind who could read and was not prevented from reading the release before signing it, even if, in reliance upon the false representations of the person to whom the release was given, he did not read the release and believed that such release was only a partial one.

2. In holding that where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured.

3. In holding that in such an instance, the issue, as to whether the person who signed the release was induced to do so by fraud or by mistake, is an issue for determination by the court.

4. In holding that while the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court.

5. In holding that releases by railroad employees of

rights arising under the Federal Employers' Liability Act stand on the same basis as the releases of others.

6. In holding that where the forum is a court of the State where such a release was made, the law of that State may determine the rights of the parties with respect to an effort to avoid the release.

7. In holding that such an effort to avoid a release relates to rights arising under the contract of release.

8. In holding that where a release which is not void is a release of rights of an employee under the Federal Employers' Liability Act, no question relating to rights under that act arises until the contract of release has been set aside.

9. In holding that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in the State of Ohio and questions as to the avoidance of such a release are to be determined in the courts of the State of Ohio by the law of Ohio.

The above assignments of error present two primary or fundamental questions—

1. Whether the law of the Forum (Ohio), where the release by a railroad employee of rights arising under the Federal Employers' Liability Act was made, or the common law, as found and interpreted by the Federal Courts, determines the rights of the parties with respect to an effort by the employee to avoid the release because of fraud in factum and fraud in the inducement practiced by the railroad releasee.

2. Whether the issue of the validity of such a release, where there are disputed facts with reference to the releasor being induced by fraud in factum and fraud in the inducement, is an issue for the determination by the jury or the court.

The trial court concluded (Appendix, *infra*, p. 32)—

> "* * * that under Flynn vs. Sharon Steel Corp. case (142 O.S. 145) this court (the trial court) can pass upon questions of fraud in this case."

The Summit County Court of Appeals held that under the recent Federal decisions, that the validity of a release was an issue of fact for the jury to determine. After reviewing the evidence, the Court of Appeals further held (App. *infra*, p. 28)—

> "The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one conclusion."

The Supreme Court of Ohio held that this question was not governed by the Federal law and that the questions of fraud, particularly, in the inducement, were factual questions for the determination of the court, the jury's function, at most, being merely advisory.

Statutes Involved

Section 1257 (3) of the Judiciary and Judicial Procedure Act, Title 28 U.S.C.A.; Sections 51 and 55 of the Federal Employers' Liability Acts (Railroads), Title 45 U.S.C.A.; and Section 688, Jones Act (Merchant Marine), Title 46, U.S.C.A.

Statement

The petitioner commenced an action in the Common Pleas Court of Summit County, Ohio, for money damages, by reason of certain personal injuries sustained by him during the course of his employment with the respondent railroad while both parties were engaged in interstate commerce (R. 1).

The respondent set forth two defenses in its answer (R. 4) —one, denying that it was guilty of negligence; the other,

alleging that it paid to the petitioner Nine Hundred Twenty-four and 63/100 Dollars ($924.63), in full settlement of all claims that the petitioner had or might have against the respondent railroad by reason of the derailment.

A reply (R. 8), and later an amended reply (R. 10), was filed by the petitioner. He admits the receipt of the Nine Hundred Twenty-four and 63/100 Dollars ($924.63), but denies that it constituted a full and complete release of all of his claims. He affirmatively alleges that one A. W. Hochberg, Chief Clerk for respondent railroad, represented to him that it would be necessary to sign a paper, releasing the railroad from all claims for loss of time and medical expense, up to the date of signature, before the petitioner could return to work. Further, he alleges that A. W. Hochberg represented to him that the paper was a release only for wages lost by the petitioner to that date by reason of his being unable to work. Petitioner alleged that he relied upon such representations, which were false, and that he was damaged by reason of the false representations. He further alleges that he had no knowledge that the purported release was a full and complete release of all of his claims against the railroad; that at no time did he receive any consideration from the railroad for the execution of said release; that said release was wholly void and without consideration; and that he tendered to the respondent railroad the said sum of Nine Hundred Twenty-four and 63/100 Dollars ($924.63), which it refused to accept.

Upon the first trial of the cause, the jury disagreed and was discharged by the Court. At the commencement of the second trial, the respondent railroad requested the Court to determine the question as to the validity of the release before proceeding to the trial of the other issues raised by the pleadings. This, the Court refused to do. At the conclusion of all the evidence, the respondent requested the court to withdraw the evidence from the consideration of

the jury and instruct the jury to return a verdict for the defendant. This, the trial court refused to do and submitted the case to the jury, which returned a verdict of Twenty-five Thousand Dollars ($25,000.00) for the petitioner.

Thereafter, two motions were interposed by the respondent railroad. One was for a judgment in its favor upon the special findings of fact returned by the jury, notwithstanding the general verdict of the jury in favor of the petitioner. The trial court overruled this motion. The second motion was for judgment in favor of the railroad and against the petitioner, notwithstanding the general verdict of the jury in favor of the petitioner. The trial court sustained this motion. (R. 310)

The basis of the trial court's judgment was that it was the ultimate fact finder of fraud, the jury's function merely being advisory in this respect. The trial court found that the petitioner had failed to establish by clear, unequivocal and convincing evidence the issue of fraud raised in his amended reply concerning the release set forth by the respondent railroad, in spite of the jury's general finding to the contrary. The trial court instructed the jury that the petitioner, the plaintiff, must establish fraud "by evidence, clear and convincing". (R. 296, 299) A copy of the trial court's finding may be found in the Appendix *infra*, p. 29.

The petitioner took his exception to the trial court's ruling and perfected an appeal upon questions of law only to the Court of Appeals of Summit County, Ohio, an intermediate appellate court. The question presented to the Court of Appeals was "the propriety of the trial court's finding, as a matter of law, that the several releases given by Dice, and especially the release which was executed in September, 1944, was valid and binding upon Dice". (Appendix, *infra*, p. 25. The Court of Appeals concluded that the trial court committed error. It specifically found that

"The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one conclusion. The trial court was, therefore, required to present such question to the jury as an issue of fact, and not resolve such issue as a matter of law". A copy of the opinion of the Court of Appeals is set forth in the Appendix, *infra*, p. 23. The Court of Appeals reversed the trial court.

The Supreme Court of Ohio allowed the motion to certify, filed by the respondent railroad, and upon hearing the cause on the merits, reversed the Court of Appeals. Judgment of reversal was entered March 28, 1951.

Petitioner's Evidence of Fraud

The derailment in which the petitioner was injured occurred on May 29, 1944. He was released by his physician on June 14, 1944, when he presented himself at the office of Chief Clerk Hochberg for the respondent railroad. This agent computed the wages lost by reason of the petitioner's absence and prepared a check in that amount, payable to his order (R. 248); and another one for Eighty-four and 19/100 Dollars ($84.19), covering personal belongings lost in the wreck by the petitioner. Before delivering these checks, according to Dice, Hochberg handed petitioner a paper (Defs. Ex. 8, a general release, Ad. R. 272; Appendix *infra*, p. 36, stating it would be necessary for him to sign before he would be permitted to go back to work; that the paper was a release covering his loss of wages up to that date. (R. 282, 130) He further stated, according to Dice, that in the event Dice had any "recurrence" of the injuries he received due to the wreck, the railroad would reopen his case if the petitioner brought in a statement from his doctor. Hochberg admitted that he did not read the June 14th release to Dice and that he had it in his hands

only a few minutes. (R. 251) He further admits that Dice inquired, before signing, if the company would reopen his case if he suffered a "recurrence". (R. 252) He signed the paper and was immediately handed checks in the sum of One Hundred Thirty-nine and 66/100 Dollars ($139.66) and Eighty-four and 19/100 Dollars ($84.19), and cashed them. (Defs. Exs. 6, 7, 8, Ad. R. 272; and see R. 281, 282) Although the check for One Hundred Thirty-nine and 66/100 Dollars ($139.66) carried a notation, "In full settlement of injuries received at Rushmore, 10:08 A. M., May 29, 1944", petitioner testified that he did not read this notation. (R. 220) The paper (Defs. Ex. 8, Ad. R. 272) which the petitioner Dice signed was, in fact, a general release of all claims against the railroad.

Thereafter, Dice suffered a "recurrence" of his injuries and was unable to work from July 6, 1944 to September 7, 1944. On three separate occasions, August 8th, August 14th and August 28th, the railroad paid Dice Seventy-five Dollars ($75.00) each. (R. 220, 221, 223; Defs. Exs. 9, 12a, 14, Ad. R. 272, 273, 274) These checks carried the following notation: "For additional partial settlement of injuries received at Rushmore, Ohio, at 10:08 A. M., May 29, 1944". Petitioner testified that he did not read these notations. (R. 218, 221, 223, 224) On September 4th, it paid him Four Hundred Seventy-five and 78/100 Dollars ($475.78). The check representing this sum (Defs. Ex. 12, Ad. R. 273) carried this notation: "In full settlement account of injuries received at Rushmore, Ohio, 10:08 A. M. on May 29, 1944". However, petitioner insisted that he did not read this notation. (R. 149, 151) These sums represented lost wages, which was admitted by the railroad's agent upon cross-examination. (R. 244, 245, 246, 247, 248, 250)

When the final payment was made to Dice on September 5, 1944, for all intents and purposes, the same scene was

reenacted that took place when he signed the first release on June 14th. Before giving Dice his check, the railroad's agent Hochberg handed Dice a paper, (Plfs. Ex. 6, a general release, Ad. R. 165; Appendix *infra,* p. 38, and stated, according to Dice, that this was a release only for wages lost; that he would not have to read it; and that the railroad would reopen his case in the event the petitioner suffered a "recurrence". (R. 130, 132, 135, 136, 137, 139, 140, 142, 143, 148, 153, 155)

The paper which Dice signed was a general release of all claims which he had or might have against the railroad by reason of the injuries sustained by reason of the derailment. It was identical in form to the one he had signed earlier and is the one upon which the railroad relied as a defense to his claims set forth in the petition. (Plfs. Ex. 6, Ad. R. 165)

Dice had a "recurrence" of his injuries so that between the time of the wreck in May of 1944 and April 25th, 1947, the petitioner was off work a total of one hundred thirty-five (135) days. Since April 25th, 1947, Dice has not worked for the respondent as he was unable to perform his duties as a fireman because of his physical condition. (R. 51, 52, 56, 57, 58, 66, 85)

In April of 1947, Dice made a demand upon the respondent railroad to reopen his case, which it refused to do. Thereafter, he commenced his action in the Common Pleas Court of Summit County against the railroad.

Prior to filing his reply and amended reply, he tendered to the railroad the sums which it paid him, which it refused. This tender is admitted by the railroad. (R. 275, 276, 277)

Respondent's Direct Testimony

The respondent, through A. W. Hochberg, its chief clerk, in testifying with reference to the release of June 14, 1944

(Defs. Ex. 8, Ad. R. 272; Appendix, *infra,* p. 36), and that of September 5th, 1944, (Plfs. Ex. 6, Ad. R. 165; Appendix *infra,* p. 38, denies making any representation that the amounts set forth in the releases and the checks delivered to the petitioner were for wages only, or that the railroad would reopen petitioner's file or case in the event he suffered a "recurrence" or reaction from the injuries sustained. He did, however, state that he did not tell petitioner what the September 5th release was for, and that the release was only in petitioner's hands a few minutes. (R. 234, 235)

Respondent's Testimony upon Cross-Examination

The railroad, through A. W. Hochberg, upon cross-examination, again denied that any representations were made to the petitioner that the amounts set forth in the releases were for wages only, or that the company would reopen petitioner's case if he suffered a recurrence. However, the following, elicited from Hochberg upon cross-examination, partially corroborates petitioner's evidence of fraud:

(a) Hochberg did not read the releases to petitioner, nor did he explain their contents to him. (R. 251, 252, 257)

(b) Hochberg admitted that petitioner inquired of him as to whether or not the railroad would reopen his case if petitioner suffered a recurrence from the injuries received. (R. 252, 253, 257)

(c) Respondent admitted that they did reopen petitioner's case and made additional partial settlement after the execution of the first release. (R. 253)

(d) Respondent admitted that the amounts set forth in both releases, and the checks given to petitioner, were determined by computing what petitioner would have earned, had he worked during his time off because of his injuries. (R. 244, 245, 246, 247, 248) In

other words, the amount set forth in the releases and what petitioner received represented lost wages only.

It is obvious that the issue as to whether or not the releases were obtained by fraud or misrepresentation was one involving the weighing of the evidence and of determining the credibility of witnesses. If the jury believed the petitioner, the releases were void; if they believed Hochberg, the releases were valid.

ARGUMENT

I

The Validity of a Railroad's Employee's Release Given to His Railroad Employer on Account of Injuries Sustained by Reason of a Derailment When Both Parties Were Engaged in Interstate Commerce, Is Controlled by the Law as Found and Interpreted by the Federal Courts, and Not the Law of the Forum, in an Effort by Such Releasor to Avoid His Release, Because of Fraud, Either in Factum or in the Inducement, Practiced by the Releasee.

It has been the consistent policy of this court, since the Second Employers' Liability cases, 223 U. S. 1, that in order to insure uniformity in the administration of rights and obligations arising under the Act, Federal Court decisions, both as to the interpretation of the Act and applicable common law controlled. In *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan,* 271 U. S. 472 (1926), Justice Butler, speaking for the court, at page 474 of his opinion, said:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. Second Employers' Liability cases, 223 U. S. 1, 55; Seaboard Airline R. Co. vs. Horton, 223 U. S. 492, 501. * * *

> The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the Federal courts"

See also *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44 (1931). To be sure, those decisions were concerned principally with questions involving the determination of liability. However, the United States Courts of Appeals, particularly those of the Second, Sixth, Eighth and Ninth Circuits have held that the principle of uniformity extends to issues involving the validity of releases. See—

Ricketts v. *Pennsylvania R. R.*, 153 Fed. (2) 757 (1946);
Thompson v. *Camp* (1947), 163 Fed. (2) 396;
Irish v. *Central Vermont Ry. Inc.*, 164 Fed. (2) 837 (1947);
Graham v. *Atchison T. & S. F. R. Co.*, 176 Fed. (2) 819 (August 30, 1949);
Chicago & N. W. Ry. Co. v. *Cook*, 178 Fed. (2) 497 (1949).

Independently of the above decisions, the provisions of Section 55 of the Act would seem to require the extention of the above rule of uniformity to questions involving the validity of releases. This Section in part provides:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void. * * *"

The entire Section is contained in the Appendix, p. 40.

In *Duncan* v. *Thompson, Trustee* (1942), 315 U. S. 1, this court decided that Section 55 was equally applicable to contracts made after a railroad employee had sustained injuries, as well as to ones entered into before. Of course, this Section does not prevent the making of "a bona fide

compromise" or settlement (*Duncan* v. *Thompson, supra; Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 625). Of necessity, however, any such agreement must be interpreted or examined, to determine whether or not it impinges upon the restrictions of this Section. This is precisely what the court did in *Duncan* v. *Thompson, supra.*

The United States Court of Appeals for the Second Circuit in *Irish* v. *Central Vermont Ry. Inc.*, 164 Fed. (2) 837 at 840 (1947) held that if a "release were obtained fraudulently by the appellee (railroad employer), it was within the broad scope of the phrase, 'any * * * device whatsoever' in Section 5 and consequently void. * * *Duncan vs. Thompson, supra."

In *Garrett* v. *Moore-McCormick Co.*, 317 U. S. 239, this court held that the validity of a seaman's release is controlled by federal law. Justice Black, speaking for the court at page 245, said—

> "It must be remembered that the state courts have concurrent jurisdiction with the federal courts * * * The source of the governing law applied is in the national, not the state, governments. If by its practice, the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."

Since the Jones Act (Title 46, Sec. 688 U. S. C. A.) incorporates by reference, the provisions of the Federal Employers' Liability Act, it would seem, therefore, that the principle of uniformity relative to seamen's releases would

be equally applicable to railroad employees' releases, and particularly, in view of the explicit provisions of Section 55 thereof.

The Supreme Court of the State of Utah in *Kirchgestner* v. *Denver & R. G. W. R. Co.*, 218 Pac. (2nd) 685; the California Court of Appeals in *Pacific Electric Ry. Co.* v. *Dewey*, 95 C. A. (2nd) 69, 212 Pac. (2nd) 255; the *Union Pacific R. Co.* v. *Zimmer*, 87 C. A. (2nd) 524, 197 Pac. (2nd) 363, have respectively held that the validity of railroad employees' releases are determined by the common law as interpreted by the federal courts.

II

The Validity of Such a Release, Where There Are Disputed Facts With Reference to the Releasor Being Induced by Fraud in Factum and Fraud in the Inducement Practiced by the Releasee, Is a Jury Issue.

The generalization made by Judge Yankwich of the United States Court of Appeals (9th Circuit), during the course of his opinion, rendered in *Graham* v. *Atchison T. & S. F. R. Co.*, 176 Fed. (2) 819, at 823 (August 30, 1949), is appropriate.

He said, in considering a like problem:

> "In approaching the matter, we start with the fact that, because of the nature of the Federal Employers' Liability Act and its aim to aid the employee injured in the course of his employment, courts do not encourage any action which deprives the employee of the right to have determined by a jury the controversy between him and his employer on the merits."

Among the many decisions of this court, cited in support of this conclusion, is the recent one, *Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 625. Accordingly, the Ninth Circuit Court of Appeals held that the factual question involving

the validity of the release was for the determination of the jury. It is noteworthy that the disputed facts in the *Graham* case involved mistake of fact and fraud in the inducement.

The United States Court of Appeals for the Second District has similarly held that questions of fact involving the validity of releases, whether they arise from mutual mistake of fact or fraud, either in factum or in the inducement, are for the determination of the jury.

Note the following:

Ricketts v. *Pennsylvania R. R.*, 153 Fed. (2) 757 (1946);
Brown v. *Pennsylvania Ry. Co.*, 158 Fed. (2) 795 (1947);
Irish v. *Central Vermont Ry., Inc.*, 164 Fed. (2) 837 (1947);

See also decision of the Eighth Circuit Court of Appeals in *Chicago & N. W. Ry. Co.* v. *Curl*, 178 Fed. (2) 497 (1949).

The above Appellate Court decisions, in holding that the validity of a release is a jury issue, make no distinction whatsoever between fraud in factum, fraud in the inducement or mutual mistake of fact. Apparently, this Court makes no such distinction. In *Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 625, it was held that the factual issues involving mutual mistake of fact were for the jury's determination. Moreover, Section 55 of the Federal Employers' Liability Act would seem to wipe out any distinction between a void and voidable release since, as Judge Chase said in *Irish* v. *Central Vermont Ry., Inc.*, 164 Fed. (2) 837 @ 840 (1947). "The broad scope of the phrase 'any * * * device whatsoever'" therein would render void any contract obtained fraudulently.

Because the petitioner urged this conclusion in the intermediate Ohio Appellate Court and the Ohio Supreme Court,

the latter Court charges the petitioner, as not seriously contending that there was any evidence in the instant case to justify a finding of fraud in the factum.

We most respectfully take exception to this. According to the petitioner's testimony, the petitioner accepted the releasee's invitation not to read the September 5th release and relied upon its representation that it was for lost wages only and not a general one (R. 132, 136, 137, 139, 140, 147, 155).

The Supreme Court of Ohio holds that under such circumstances, there cannot be fraud in factum as a matter of law.[2]

Because the petitioner had an opportunity to read, he is estopped from saying he was misled. Note concluding paragraph in portion of Court's opinion cited footnote 1, *supra*.

---

[1] *Dice* v. *Rd. Co.*, 155 O.S. 185 at 190, 191.

"Plaintiff does not seriously contend that there was any evidence in the instant case to justify a finding of fraud in the factum. He apparently recognizes that there could be no such fraud in the instant case. Even if, as alleged in the amended reply, defendant did misrepresent to plaintiff the contents of the release and plaintiff executed the release in reliance upon that misrepresentation and in the belief that it was something else, plaintiff could admittedly read the release and there was no evidence that anything was done to prevent him from reading it. Plaintiff testified that he was told by defendant's employee that he would not have to read the release. This was denied by defendant's employee. However, there was no evidence tending to prove that plaintiff was denied an opportunity to read the release.

"A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed."

[2] In Ohio, the Syllabus is the law of the case. The first paragraph of the Supreme Court's syllabus in the *Dice* case (155 O.S. 185), reads:

"1. A complete release is not void because of fraud in the factum, where it was executed by a person of ordinary mind who could read and was not prevented from reading the release before signing it, even if, in reliance upon the false representations of the person to whom the release was given, he did not read the release and believed that such release was only a partial one."

However, the Court holds that the above evidence may be considered fraud in the inducement, but the weighing or determination of its presence, even though it involves credibility of witnesses, must be left to the Chancellor or Court. This is indeed a fine distinction since under either of its aspects there has been, in fact, no actual meeting of the minds. The releasor had no actual knowledge that the instrument was a general release, rather than a limited one for lost wages. Inject into the factual situation, physical duress or mental incapacity, then according to the Supreme Court rule, it could be considered fraud in factum. In short, under the Ohio rule, a railroad employee must deal at arm's length with his employer. He must be on the lookout at all times, even though on one occasion the railroad treated the release as represented, namely, a limited one, and reopened his case. Nevertheless, he cannot rely upon such past conduct other than at his peril. This harsh policy seems in direct conflict with that indicated by Congress through the provisions of Section 55 of the Federal Employers' Liability Act.

In this aspect, no equitable relief is involved, since neither cancellation nor ~~representation~~ reformation is required. The single question is—was there, in fact, a contract. The answer to this inquiry is—was there a meeting of the minds. The withdrawing of the determination of these facts from the jury impinges upon the limitations of the Seventh Amendment of the Constitution of the United States, guaranteeing the right of trial by jury in common law actions for money.

This Court has held, in effect, that this constitutional limitation extends to the rights granted under the Federal Employers' Liability Act. See *Bailey v. Central Vermont Railway, Inc.*, 319 U. S. 350, in which Mr. Justice Douglas said at page 354:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. Jacob v. New York, 315 U. S. 752 * * * It is a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act."

If the petitioner is correct in his contention that the validity of the release is a jury issue, particularly, when there is fraud in factum, then the evidence in this case is such that under federal law, as applied by federal courts, motions for a directed verdict or a judgment for the defendant notwithstanding the verdict of the jury in favor of the plaintiff, would have been overruled and not sustained.

The intermediate Appellate Court (Court of Appeals of Summit County, Ohio), after reviewing all of the evidence, expressly held (Appendix, *infra*, p. 28):

> "* * * The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one conclusion. The trial court was therefore required to present such question to the jury as an issue of fact, and not resolve such issue as a matter of law."

The Supreme Court of Ohio does not contradict this factual conclusion but holds, since the validity of the release is for judicial rather than jury determination, there was then substantial evidence to sustain the court's finding that fraud was not shown by clear and convincing evidence. Parenthetically, the trial court charged the jury that the plaintiff had the burden to establish his claim of fraud against the defendant company by clear and convincing evidence (R. 294, 296, 299).

The rule applied by the Summit County Court of Appeals in this respect is in accord with the federal rule. In *Wilkerson* v. *McCarthy*, 336 U. S. 53 (1949), @ p. 62, Mr. Justice Black stated:

> "And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences'. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts."

If there is any conflict in the evidence, it is for the jury and not the court to resolve. This is so, even though there is a very narrow conflict. See Mr. Justice Black's opinion in the above case, page 60, wherein he says:

> "While this left only a very narrow conflict in the evidence, it was for the jury, not the Court to resolve the conflict."

The weighing of the credibility of witnesses has repeatedly been held to be a jury function. Note: *Brady* v. *Southern R. R. Co.*, 320 U. S. 476.

If the jury, in the instant case, believed Dice, there was fraud in factum as well as fraud in the inducement and the release is void. If the jury did not believe Dice, but rather Hochberg, then such fraud is not present and the release is valid.

Any contention that this issue of whether it is a jury or court function to determine the validity of a release is one of form and not of substance, is completely disposed of by the decisions in *Garrett* v. *Moore-McCormick Co.*, 317 U. S. 239 (1942) and *Brown* v. *Western Ry. Alabama*, 338 U. S. 294 (1949). To be sure, the former involved the question of burden of proof, Mr. Justice Black, during his opinion therein, said:

> "* * * The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very

substance of his claims and cannot be considered a mere incident of a form of procedure. * * *" (317 U. S. 239 @ 249).

In the latter case, it is held that the right of trial by jury is a part of the employee's substantive rights and that rules of the forum would not be permitted "to dig into substantive rights". In the *Brown* case, a general demurrer to the petition was sustained by the trial court which was ultimately affirmed by the Supreme Court of Georgia, under a statutory rule of Georgia, requiring pleadings to be strictly construed upon demurrer thereto. In answer to the contention that such provisions involved merely form and not substance, Mr. Justice Black said:

> "It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in the FELA cases, they are free to follow their own rules of 'practice' and 'procedure'. To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. * * * Other cases in this court point up the impossibility of laying down a precise rule to distinguish 'substantive' from 'procedure'.
>
> "Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether the petitioner had been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice." (338 U. S. 294 @ 296).

Conclusion

It is respectfully submitted that the trial court and the Supreme Court of Ohio misinterpreted the law. The cor-

rect rule of law was stated and applied by the intermediate Appellate Court, the Summit County Court of Appeals. The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

RICE A. HERSHEY,
FREDERIC O. HATCH,
GOTTWALD, HERSHEY & HATCH,
Attorneys for Petitioner.

October, 1951.

APPENDIX

OPINION OF THE COURT OF APPEALS

No. 4095

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

State of Ohio, Summit County, SS

JOHN F. DICE, *Appellant*

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD CO., *Appellee*

OPINION

Argued June 22, 1950
Decided Aug. 2, 1950

APPEAL ON QUESTIONS OF LAW

Gottwald, Hershey & Hatch, for Appellant.
Wise, Roetzel, Maxon, Kelly & Andress, for Appellee.

HUNSICKER, J.:

This is an appeal on questions of law.

John F. Dice, appellant, herein called Dice, brought an action against The Akron, Canton & Youngstown Railroad Co., appellee, herein called Railroad, to recover for personal injuries arising out of an accident which occurred when a locomotive upon which Dice was working as a fireman, was derailed.

The parties were engaged in interstate commerce, and the action was brought under the provisions of the Federal Employers' Liability Act.

The petition of Dice alleged the essential facts necessary to state a cause of action. The Railroad in its answer admitted that it was a common carrier engaged in interstate commerce, and that Dice, an employee, was injured as a result of the derailment, but specifically denied it was

guilty of negligence, and denied the claimed extent and nature of the injuries Dice sustained.

As a second defense to the claims of Dice, the Railroad said it had paid Dice the sum of $924.63 as a full and complete settlement of all claims which he might have against the Railroad. The Railroad also alleged that Dice had executed and given to the Railroad a full and complete written release and satisfaction of all claims and rights of action which he, Dice, might have against the Railroad.

A reply, and later an amended reply, was filed by Dice, in which he stated that: there was no full and complete settlement of his claims against the Railroad; $924.63 was paid to him but not as a full settlement; he tendered the amount of $924.63 to the Railroad, which sum they refused to accept; he signed various papers for the Railroad which, he was informed, were necessary to release the Railroad from claims for loss of work time and medical expenses before he, Dice, could return to work. Dice further denied that he knew that, at the time he executed the purported release, it was a complete release of all claims of every kind and character. Dice further said he believed the representations of the agent for the Railroad that such release was only for wages lost to the date of the signing of such release; that such representation was false and was relied upon by him to his damage.

At the beginning of the trial, counsel for the Railroad sought to have the validity of the release determined by the court as a matter of law, separate and apart from and prior to the determination of any issues of fact. The trial court determined to proceed to try all issues to the jury.

A verdict was returned by the jury in favor of Dice, and, upon a motion for judgment notwithstanding the verdict made by the Railroad, a judgment in favor of the Railroad was entered by the court.

It is from such judgment that this appeal is prosecuted by Dice, who says:

> "The trial court committed error prejudicial to the rights of the plaintiff-appellant in sustaining the defendant-appellee's motion for judgment in its favor

notwithstanding the verdict of the jury for the plaintiff-appellant."

The parties, by their briefs and in oral argument of counsel, confine their discussion to the propriety of the trial court's finding, as a matter of law, that the several releases given by Dice, and especially the release which was executed in September, 1944, were valid and binding upon Dice.

The instant case was brought pursuant to the provisions of the Federal Employers' Liability Act of 1908, 45 U. S. C. A., Sec. 51, et seq., as amended in 1939.

We are, therefore, required to determine whether, under the provisions of the Federal Employers' Liability Act, the submission of the question of the validity of such a release is a matter for the jury or for the court.

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. * * * The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts."
>
> Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S. 472, at p. 474; 70 L. Ed. 1041, at p. 1043.

See also:

> Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44, at p. 46; 76 L. Ed. 157, at p. 160.

> "It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure'. To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. Central Ver-

mont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 S. Ct. 865, Ann Cas. 1916B 252, 9 NCCA 265. Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure'. Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. See American R. Exp. Co. v. Levee, 263 U. S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11."

Brown v. Western Ry. of Alabama, 338 U. S. 294, 94 L. Ed. 93, at p. 95.

Many recent cases concerning the more limited phase of the problem before us have been reported by the federal courts. If it ever was the law, as applied to this question before us, that the validity of a release merely voidable, was a question of law to be determined by the court and not an issue of fact to be submitted to the jury, these late cases effectively state that the issue is one of fact for a jury to determine.

In this connection, the recent case of Garrett v. Moore-McCormick Co. (1942), 317 U. S. 239; 87 L. Ed. 239 (a release case founded under the Federal Merchant Marine Act), made a pronouncement on the subject which the Federal Circuit Courts of Appeals were quick to adopt in their applications to similar situations arising under the Federal Employers' Liability Act.

The validity of a release which is relied on as a defense to an action under the Federal Employers' Liability Act is a question which is to be determined by federal law.

Ricketts v. Pennsylvania Rd. Co., 153 Fed. (2d) 757 (Second Circuit, 1946);

Brown v. Pennsylvania Rd., 158 Fed. (2d) 795 (Second Circuit, 1947);

Thompson v. Camp, 163 Fed. (2d) 390 (Sixth Circuit, 1947);
Irish v. Central Vermont Ry., 164 Fed. (2d) 837 (Second Circuit, 1947);
Graham v. Atchison, T. & S. F. Ry. Co., 176 Fed. (2d) 819 (Ninth Circuit, 1949);
Chicago & N. W. Ry. Co., v. Curl, 178 Fed. (2d) 497 (Eighth Circuit, 1950).

The Supreme Court of the United States, so far as we have been able to discover, has not directly passed on the limited question before us in the instant case. That court, however, in the case of Callen v. Pennsylvania Rd. Co., 332 U. S. 625, 92 L. Ed. 242, did say, in a release case, at page 629:

"It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict 'for the plaintiff, and assess the damages at $25,240.00, of which the Railroad is to be reimbursed with $250.00'. The court, saying he wanted to make the record right, asked the jury if they made a net finding of $24,990, which the foreman said they did. Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question.

"While the trial court assumed a finding of permanency as a basis for his setting aside of the release, after challenge to his assumption as to the nature of the injuries he made every effort to correct the impression, insofar as it affected the issue of damages. But the trial court did not correct or in any way alter his determination that the release was not binding insofar as it rested on the assumption of permanent injury. The Court of Appeals was right in holding that failure to submit this latter question to the jury was reversible error."

The recent federal cases make no distinction in the requirement that, even though the release is merely voidable and not void, a jury issue is presented.

Graham v. Atchison, T. & S. F. Ry. Co., 176 Fed. (2d) 819;
Chicago & N. W. Ry. Co. v. Curl, 178 Fed. (2d) 497;

And the Per Curiam opinion in Brown v. Pennsylvania Rd. Co., 158 Fed. (2d) 795, as bearing on this question, is as follows:

> "The appellant contends that a verdict should have been directed in its favor because of a general release executed by the plaintiff in consideration of the payment to him of $170.40. This sum was the amount of wages lost during the period of time he was incapacitated for work by reason of his injuries. He testified that he signed the document without reading it in full, believing it to be a receipt for lost wages because of representations made by the defendant's claim agent. The latter told a different story. Whether the release was procured by misrepresentation presented an issue involving the credibility of contradictory witnesses which was properly submitted to the jury for decision. See Chesapeake & Ohio R. Co. v. Howard, 178 U. S. 153, 167, 20 C. Ct. 880, 44 L. Ed. 1015; Southern Ry. Co. v. Clark, 6 Cir., 233 F. 900; Miles v. Lavender, 9 Cir., 10 F. 2d 450; Ricketts v. Pennsylvania R. Co., 2 Cir., 153 F. 2d 757; Farrington v. Harlem Savings Bank, 280 N. Y. 1, 19 N. E. 2d 657. There was also testimony that the defendant's doctor had not fully informed the plaintiff of the extent of his injuries. See Bonici v. Standard Oil Co., 2 Cir., 103 F. 2d 437, 439."

We therefore determine that the trial court committed error prejudicial to the rights of the appellant in entering judgment notwithstanding the verdict. The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one

conclusion. The trial court was therefore required to present such question to the jury as an issue of fact, and not resolve such issue as a matter of law.

We order that the cause be remanded to the Common Pleas Court, with instructions to enter judgment upon the verdict for the appellant, Dice.

STEVENS, P. J., and DOYLE, J., concur.

FINDING OF THE COURT OF COMMON PLEAS

No. 161,856

IN THE COURT OF COMMON PLEAS

State of Ohio, Summit County, SS

JOHN F. DICE, *Plaintiff*,

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD CO., *Defendant*

FINDING—December 12, 1949

HARVEY, *J.*:

This cause was presented to the jury upon the Petition, Answer and Reply. The Petition set up a cause of action for negligence under the Federal Employers Liability Act. The Answer set up a defense as a bar to that action by way of a release and also denied negligence. The Amended Reply set up an allegation in which it was attempted to plead facts, which if proven would make the release void because of fraud.

The matter was submitted to the jury, first, upon the issue of fraud, and second, upon the questions of negligence, and the jury returned a verdict for the plaintiff.

The matter was submitted to the jury upon the theories laid down in the case of Perry v. O'Neil, 78 Ohio State 200, and Flynn v. Steel Company, 142 Ohio State 145. In the

latter case it is specifically held that "if an examination of a Reply reveal substantial averments of fraud and misrepresentation as to the nature of the instrument signed, which if proven would make the transaction wholly void and ineffective, then under such state of the pleadings it was within the discretion of the Trial Court to submit the issue of fraud to the jury under proper instructions. However, the Court is not bound by the findings of the jury."

Another branch of this Court submitted the issue to the jury heretofore, and after keeping the jury out for two days they were unable to agree upon either the question of negligence or fraud.

Upon the re-trial the Court submitted Special Interrogatories, but upon the question of fraud the answers to the Interrogatories were of no assistance to the Court with the possible exception that the jury did find that the plaintiff had an opportunity to read the Agreement and Release, and did have an opportunity to read the Bank Check of September the 5th, 1944 for $475.78, and was not prevented from reading the Agreement and Release of September 5, 1944.

Although the Court thoroughly charged the jury upon the questions of fraud with reference to the Release in the second trial, the jury seemed to have misapprehended the whole concept of fraud, and the case is now before the Court on a Motion for Judgment Notwithstanding the Verdict.

The facts substantially show that the plaintiff in this case was a fireman upon a locomotive which derailed, and that he sustained some injuries; that after the accident he was taken to the end of the line; that he slept all the rest of the day and in the evening was taken in an automobile to the Brittain Road Yards, where in his own car he drove home; that the following day at the instance of the railroad company he was taken to the City Hospital.

The accident occurred on May 29, 1944. He was placed in the City Hospital on May 30, 1944 and was released June 2nd, 1944. He had some multiple contusions and was discharged upon that date. An X-ray taken at that time shows—osteo-arthritic changes of the cervical spine and no evidence of fracture, no evidence of any fractured ribs.

Since the osteo-arthritic conditions showed on the X-rays two days after the accident, it cannot be claimed that this condition arose from this accident. Plaintiff complains particularly of pain in the region of his lower left abdomen or groin.

Under the authority of Flynn v. Steel Company, supra, this Court is of the opinion that the first issue to be determined under the Motion for Judgment Notwithstanding the Verdict is the validity of this Release, it being claimed that the Release is of no force or effect and is vitiated by fraud upon the part of the agent of the Railroad Company.

After the plaintiff had been released from the Hospital and remained at home for some time, he made a claim for additional damage by way of personal belongings destroyed in the wreck, and on June 14, 1944, he was given a check which stated across the front thereof, "To reimburse you for personal belongings destroyed in wreck at Rushmore, May 29, 1944." On the same date he was given a check for $139.66 in full settlement, marked, "In full settlement for personal injury received at Rushmore, Ohio, at 10:00 A.M., May 29, 1944"; and he also signed a complete release upon the same date. He was released for work by Dr. Lemmon on June 13th, 1944, went back to work on June 15, and worked the balance of that month and also worked on July 1st, July 3rd and 4th. He did not work during the month of August.

During the month of August the plaintiff was given three separate checks for $75.00 each on August 8th, the 14th and the 28th, and the checks were marked across the front, "For additional partial settlement of personal injury received at Rushmore on May 29, 1944."

Plaintiff during this interim had been attended by Dr. Schaffner. On the 5th day of September, 1944 the plaintiff was ready to report for work, and he called at the office of the railroad company where he talked to the company's agent, Mr. Hochberg. The evidence discloses that he was in the office about one hour, and that during that time Mr. Hochberg checked over his record and the former expenditures that had been made and a Release was typed and handed to the plaintiff for his signature. The Release is known as Plaintiff's Exhibit 6 in this case. At the top of

the Release, it says in bold type, "Agreement and Release," and in black bold type the Release specifically says "Personal Injuries received at Rushmore, Ohio 10:00 A.M., May 24, 1944, in addition to the settlement made on June 14, 1944 and partial settlements of $75.00 each made on August 8th, 14th and 28th, 1944." The Agreement was made on the 5th day of September.

There is a typographical error "9th day of September," but this was conceded to be a typographical error.

The plaintiff signed this Release in three places.

He signed the complete Release and under this is the following language, "I hereby certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act," signed "John F. Dice," and below this the Release says, "I have this day received from The Akron, Cantor, Youngstown Railroad Company the sum of $475.78 in full satisfaction of the obligation of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract," signed "John F. Dice."

At the same time the plaintiff was given a check for the above sum, and across the face of the check was the following language, "In full settlement account of injury received at Rushmore, Ohio 10:08 A. M. on May 29, 1944." The check was later endorsed and cashed by the plaintiff.

Now, the plaintiff claims that it was represented to him that it would be necessary to sign a paper releasing the defendant Company from all claims for loss of time and medical expenses up to that date before he could go back to work, and that he relied on said promises and representations. He also claims that it was represented by Hochberg that the purported Release was a release only for wages lost by this plaintiff to the date thereof by reason of him being unable to work by reason of the injuries he had sustained.

And it is these claimed representations that constitute the fraud in the obtaining of the execution of this Release.

Whether these alleged misrepresentations constitute a proven a void release or a voidable release it is not necessary to decide. The Court is of the opinion that under the Flynn v. Steel Company case this Court can pass upon the question of fraud in this case.

In a suit under the Federal Employers Liability Act, the Federal law controls as to the validity of a release pleaded and proved in bar of the action, and the burden of showing that the alleged fraud vitiates the contract or compromise or release rests upon the party attacking the release.

In determining whether a release was obtained by fraud, the result turns on the nature of the transaction involved, the representations by the representor, the relation existing between the parties, whether one of trust, confidence, friendship, close acquaintance or that of strangers dealing at arms-length or trick or artifice, if any, employed.

The evidence in this case does not disclose any trick or artifice used upon the part of Mr. Hochberg. The plaintiff signed a release and he knew he was signing a release. The parties were dealing at arms-length, and when a contract is reduced to writing it expresses final agreement and is presumed to merge all prior negotiation and becomes the highest evidence of agreement, and possesses greater stability than the contracts merely in parole.

In the case of Poe v. Illinois, 99 S. W. 2nd, at page 82, it was held in an action under the Federal Employers Liability Act that an employe is not entitled to avoid a release for injuries which employe denied being able to read, claimed had been obtained by fraudulent representation that it was merely a receipt for wages or injuries where across the face of the Release was printed 'Read this Release.' Employe did not apprize employer's agent that he was unable to read an application for employment, various records or statement of injuries previously signed by employe, stated that he had read them."

In this case we have a situation where the plaintiff not only could read but didn't read, and he claims that the several releases that he received and the several checks that he received were not read by him.

In the case of Rader v. Lehigh Valley Railroad Company, 26 Federal Reporter, 2nd, the Court held that "One employe as a locomotive engineer for thirty-five years who was handed a general release by railroad's claim agent and signed statement that he understood and had read release and signed vouchers acknowledging receipt of money

paid in settlement, held as a matter of law not entitled to recover for injuries from railroad, and refusal of Court to submit case to jury on issue of fraud was proper."

The plaintiff in this case had been in the railroad business for eight years. He had worked for three different railroads during that time.

The Court further held that "supra evidence of fraud must be clear, precise and indubitable to permit submission of question of fraud to jury to overturn written instrument."

The only testimony upon which he can base any question for the jury is his bare testimony about it that he took it to be a release for wages. It is true that he volunteered a statement that the representative had promised that this matter would be re-opened in the event that he had, as he termed, a reaction.

How can he say that the agent said it would be re-opened, and at the same time say he did not understand that it was for all injuries he had received? If the matter of reopening the question was before the parties at the time this instrument was executed, then the injury must have been discussed. In order to rescind a release upon the ground of fraud, the false statement or representation must be one which gives rise to the contracting of the parties.

The plaintiff knowing his injuries and knowing that his physician had checked him for work, and knowing that he had been heretofore paid certain sums of money, it seems quite evident that the plaintiff would undoubtedly have signed the agreement and taken the $475.00 if Hochberg had said to him, "This covers all your injuries or damages." It may be assumed that the plaintiff would not have signed the release had he known that in the distant future that he would be disabled. Does it follow that he signed a contract because of any misstatement of Hochberg: This Court thinks not. He believed at the time that he was ready to go to work, and he knew at the time that he had signed releases before and that he had been paid for the loss of time, loss of personal property and medi-

cal expense. He knew that he had been dismissed from the hospital as early as June 6, 1944. He believed and expected he would be paid for any further loss of time and he was willing to accept that at the time.

When he speaks of a release for the loss of wages or time he had lost, that of course had reference to the time he had lost by reason of this injury that he sustained in May, 1944, and it is apparent that at the time he supposed that the only claim he had against the Company on account of these injuries were for loss of time for a few days and loss of wages in consequence of loss of time and such loss of time being due to the injury which he had sustained. It seems quite evident that he knew that he was releasing the Company from the only claim that he supposed he had against the Company for the injury that he supposed he had received.

Under such a situation it was held in the case of Railroad Company v. Coleman, 12 O. C. C. (N. S.) page 497 (502), that "under such circumstances it was held a release is valid in law although it be discovered afterwards that he had received more serious injuries than he supposed when he signed the release."

"The fact that a false representation was made, if it were made, in respect to the paper is not necessarily sufficient to excuse plaintiff for affixing his signature thereto in ignorance of the contents unless under all the circumstances in view of his duty to give reasonable attention to the protection of his own interests the false representation was reasonably calculated to and did induce him not to make the investigation which he would have otherwise made."

The plaintiff in this case had no intention and did not care whether he made any investigation or not.

And as was said in the case of Rader v. Lehigh Valley Railroad, supra, "If a party who can read will not read a deed put before him for execution or if being unable to read will not demand to have it read or explained to him,

he is guilty of supine negligence, which I take it is not the subject of protection either in equity or law."

This, in the opinion of this Court, is exactly the position of the plaintiff in this case, and the facts do not sustain either in law or equity the allegations of fraud by clear, unequivocal and convincing evidence.

It is, therefore, the opinion of this Court that the Motion for Judgment Notwithstanding the Verdict should be sustained.

The Court should further call the counsel's attention to the fact that the line of cases where releases have been held void are generally situations where the injured party is under opiates or under shock or in a hospital, and are instances where the Agent hands a release to the injured party while he is under disability and the release is folded and he does not understand what he is signing or hasn't the full opportunity to know what he is signing.

None of such facts exist in this case, but on the contrary the releasor in this case was in possession of all of his faculties and had had months to consider the whole question of his claim against the railroad.

DEFENDANT'S EXHIBIT 8—AGREEMENT AND RELEASE OF JUNE 14, 1944

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY

AGREEMENT AND RELEASE

File 7-2805

This Agreement made this 14th day of June, 1944 by and between The Akron, Canton & Youngstown Railroad Company and J. F. Dice of Akron, State of Ohio, hereinafter known as the Claimant:

Witnesseth:

That The Akron, Canton & Youngstown Railroad Company hereby agrees to pay said Claimant the sum of $139.66 as the sole consideration and without any other promise or agreement, and said Claimant hereby agrees

that he will accept said sum from The Akron, Canton & Youngstown Railroad Company in full settlement and satisfaction of, and that he will and does by these premises, release and discharge said The Akron, Canton & Youngstown Railroad Company from all claims, demands and causes of action whatsoever in whatever manner arising against The Akron, Canton & Youngstown Railroad Company, its successors and assigns, at common law or under any state or federal statute, which the said Claimant now has, including such as have arisen by reason of or in any manner may grow out of personal injury received at Rushmore, Ohio, 10:08 A.M., May 29th, 1944.

In Witness Whereof, the said J. F. Dice and said The Akron, Canton & Youngstown Railroad Company have executed this agreement and release on this 14th day of June, 1944.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY,
By J. G. WATKINS.

Executed in the presence of:
CLARA R. PUGH,
A. W. HOCKBERG.

JOHN F. DICE,
Claimant.

C. R. PUGH,
A. W. HOCKBERG.

I hereby certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act.

JOHN F. DICE,
Claimant.

Executed in the presence of:
C. R. PUGH,
A. W. HOCKBERG.

$139.66 Akron, Ohio.
June 14th, 1944.

I have this day received from The Akron, Canton & Youngstown Railroad Company the sum of $139.66 in full

satisfaction of the obligations of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract.

JOHN F. DICE,
Claimant.

PLAINTIFF'S EXHIBIT 6—AGREEMENT AND RELEASE OF SEPTEMBER 5, 1944

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY

AGREEMENT AND RELEASE

File: 7-2805

This Agreement made this 5th day of September, 1944 by and between The Akron, Canton & Youngstown Railroad Company and John F. Dice of Akron, State of Ohio, hereinafter known as the Claimant:

Witnesseth:

That The Akron, Canton & Youngstown Railroad Company hereby agrees to pay said Claimant the sum of $475.78 as the sole consideration and without any other promise or agreement, and said Claimant hereby agrees that he will accept said sum from The Akron, Canton & Youngstown Railroad Company in full settlement and satisfaction of, and that he will and does by these premises, release and discharge said The Akron, Canton & Youngstown Railroad Company from all claims, demands and causes of action whatsoever in whatever manner arising against The Akron, Canton & Youngstown Railroad Company, its successors and assigns, at common law or under any state or federal statute, which the said Claimant now has, including such as have arisen by reason of or in any manner may grow out of personal injury received at Rushmore, Ohio, 10:08 A.M., May 29th, 1944, in addition to settlement made on June 14th, 1944, and partial settlements of $75.00 each, made on August 8th, 14th and 28th, 1944.

In Witness Whereof, the said John F. Dice and said The Akron, Canton & Youngstown Railroad Company have executed this agreement and release on this 9th day of September, 1944.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY,
By H. G. WATKINS.

Executed in the presence of:
AUDREY GOULDTHREAD,
A. W. HOCKBERG.

JOHN F. DICE,

AUDREY GOULDTHREAD,
A. W. HOCKBERG.

I hereby certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act.

JOHN F. DICE,
Claimant.

Executed in the presence of:
AUDREY GOULDTHREAD,
A. W. HOCKBERG.

$475.78

Akron, Ohio.
September 9th, 1944.

I have this day received from The Akron, Canton & Youngstown Railroad Company the sum of $475.78 in full satisfaction of the obligations of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract.

JOHN F. DICE,
Claimant.

Title 45, Section 51, Federal Code Annotated:

"Section 51—*Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.*—Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of

the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)

Title 45, Section 55, Federal Code Annotated:

"55. *Contract, rule, regulation, or device exempting from liability; set-off.*—Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. (Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66.)"

Title 46, Section 688, Federal Code Annotated:

"688. *Recovery for injury to or death of seaman.*—Any seaman who shall suffer personal injury in the course of his employment may, at his election, main-

tain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.)"

(8000)